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In the Supreme Court of the United States

OCTOBER TERM, 1996

GARRIT BATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether intent to injure or defraud the government is an element of the offense of knowingly and willfully misapplying federal student loan funds, in violation of 20 U.S.C. 1097(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 96 F.3d 964. The opinion of the district court (Pet. App. A14-A23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1996. The petition for a writ of certiorari was filed on December 18, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

At the time of the offenses charged in the indictment, Section 1097(a) of Title 20 (1988) provided, in pertinent part:

> Any person who knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false

> statement, or forgery any funds, assets, or property provided or insured under this subchapter * * * shall be fined not more than $10,000 or imprisoned for not more than 5 years, or both.[1]

As amended in 1992, Section 1097(a) of Title 20 provides, in pertinent part:

> Any person who knowingly and willfully embezzles, misapplies, steals, obtains by fraud, false statement, or forgery, or fails to refund any funds, assets, or property provided or insured under this subchapter * * * shall be fined not more than $20,000 or imprisoned for not more than 5 years, or both.

STATEMENT

On September 8, 1994, a federal grand jury returned a 12-count indictment in the United States District Court for the Northern District of Indiana charging that, on 12 separate occasions between January 15 and June 15, 1990, petitioner knowingly and willfully misapplied federally guaranteed student loan funds, in violation of 20 U.S.C. 1097(a). Before trial, the district court granted petitioner's motion to dismiss the indictment on the ground that the indictment failed to allege intent to injure or defraud the United States as an essential element of an offense under Section 1097(a). Pet. App. A14-A23. The court of appeals reversed, holding that a conviction for knowing and willful misapplication of funds under Section 1097(a) does not require proof of a defendant's intent to injure or defraud the United States. *Id.* at A1-A13.

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[1] The full text of 20 U.S.C. 1097 (1988) is set forth in the Appendix to the brief.

1. Title IV, Part B of the Higher Education Act of 1965 (HEA), as amended, 20 U.S.C. 1070 *et seq.*, establishes a set of programs commonly known as the Guaranteed Student Loan (GSL) program.[2] The GSL program encourages lenders to make funds available to students who might not otherwise be able to obtain or afford commercial loans to finance the costs of post-secondary education. Under the GSL program, banks that loan money to students receive a guarantee from state or other non-profit organizations that loans will be repaid if borrowers default. 20 U.S.C. 1078(b)(1)(A) and (G). That guarantee is reinsured by the Department of Education. 20 U.S.C. 1078(b)(1) and (c). Additionally, the Department of Education provides interest-rate subsidies and special allowances to lenders on behalf of student borrowers. 20 U.S.C. 1078(a), 1087-1.

Under the GSL program, a school receives loan proceeds directly from the lender. 20 U.S.C. 1078(b)(1)(N); 34 C.F.R. 682.604(b)(1) and (c).[3] If the school does not deliver the loan proceeds to the student, the school must apply the loan proceeds to

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[2] In 1992, Congress renamed the GSL program the Federal Family Education Loan Program. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 411(a)(1), 106 Stat. 510. Because the conduct at issue in this case is alleged to have occurred before 1992, we refer to the program as the GSL program. Similarly, we refer to the HEA and regulations in effect in 1990, unless otherwise indicated.

[3] Schools must apply the funds "solely for the purposes specified in * * * the provision of [the HEA] program," 20 U.S.C. 1094(a)(1), and must maintain adequate administrative and fiscal procedures to ensure proper administration of, and accounting for, HEA funds, 20 U.S.C. 1094(a)(3); 34 C.F.R. 668.82.

current tuition charges. 34 C.F.R. 682.604(c) and (d).[4] If a student withdraws from the school before completion of a term, the school is required to refund "unearned" amounts of the loan to the lender. 20 U.S.C. 1092(a)(1)(F); 34 C.F.R. 682.605-682.607.[5] Knowing and willful action that impairs the integrity of guaranteed student loan funds, including "misappl[ication]" of those funds, is a criminal offense. 20 U.S.C. 1097(a).

2. Each count of the indictment (J.A. 2-12) incorporates the following factual allegations: James and Laurenda Jackson were the owners and operators of Education America, Inc., a for-profit consulting and management firm for technical and vocational schools. In December 1986, the Jacksons purchased the Acme Institute of Technology, a not-for-profit technical school located in South Bend, Indiana. Petitioner, who was Vice-President of Education America, became Treasurer of the Board of Trustees of Acme. J.A. 2. On April 30, 1987, Mr. Jackson, on behalf of Acme, signed a program participation agreement with the Department of Education, which required compliance with the HEA and regulations governing the GSL program.[6] Petitioner had signed a similar participation agreement on behalf of a different school owned by Education America. J.A. 3.

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[4] The school must deliver funds that exceed current tuition payments to the student or, with the student's written permission, credit the student's account at the school by that amount for the student's use for the remainder of the academic year. 34 C.F.R. 682.604(c)(2) and (d)(1)(ii).

[5] Schools must establish and publish a refund policy, 20 U.S.C. 1092(a)(1)(F); 34 C.F.R. 682.606(a), and must make refunds to lenders within 60 days following a student's withdrawal, 34 C.F.R. 682.607.

[6] See 20 U.S.C. 1094(a); 34 C.F.R. 668.12(b), 682.600(b).

Acme's tuition refund policy, which was set forth in Acme's catalog and student enrollment agreement and application for admission, provided that tuition would be refunded to students according to the length of the school term remaining at the time of the student's withdrawal. *Ibid.* Acme used a special bank account that segregated unearned tuition income from the school's general account. Acme's former owners utilized the special account to ensure the availability of monies to make refunds to lenders. J.A. 4.

Beginning in late 1987, petitioner and the Jacksons began a pattern and practice of failing to refund GSL program funds. J.A. 4. On April 14, 1988, Mr. Jackson instructed the director of Acme to remit 10% of Acme's monthly gross receipts to Education America as a management fee, and to arrange for a specified monthly salary to be paid by Acme to the Jacksons. In the event that those payments created a shortfall, Education America agreed to loan the money back to Acme. By September 1988, Acme owed lenders approximately $55,000 in overdue refunds. *Ibid.*

In late 1988 or very early 1989, Education America officials instructed Acme to discontinue using the special bank account from which Acme disbursed student loan refunds. In January 1989, when Acme's refund liability reached $68,000, Acme's Financial Aid Director sent a letter to Mr. Jackson indicating the serious nature of the unpaid refunds. J.A. 4. During that time, petitioner began determining on a weekly or daily basis which bills Acme would pay. Petitioner also determined that payments to the Jacksons and Education America would be given priority over making refund payments to lenders following student withdrawals. In so doing, petitioner specifically di-

rected Acme employees not to make refund payments. By March 1989, Acme's refund liability grew to $85,000. J.A. 5.

On March 13, 1989, petitioner, as Executive Vice-President of Education America, wrote to Acme's Financial Aid Director. The letter notified the Financial Aid Director that, at her request, she was released from all responsibility for making loan refunds, and that refunds of unearned tuition would be "solely the responsibility and decision of the corporate office." J.A. 5. The letter also instructed the Financial Aid Director to continue preparing refund documents to be approved by the corporate office for payment. *Ibid.*

In May 1989, a national accrediting association, the National Association of Trade and Technical Schools (NATTS), issued a report following an on-site audit of Acme. NATTS's report concluded that Acme had "inadequately demonstrated its ability to make appropriate and timely refunds, [and had also] loaned substantial amounts of money to the chief trustee and a non-related profit making institution." J.A. 5. The report also noted evidence of "upstreaming" of management fees to Education America and Mr. Jackson. *Ibid.* Acme subsequently lost its accreditation. On April 7, 1990, the Department of Education notified Acme that, effective March 8, 1990, it was no longer eligible to participate in the GSL program. On June 5, 1990, when Acme ceased operations, Acme's accrued total refund debt was $139,649, excluding interest and special allowances. J.A. 5-6.

3. On September 8, 1994, a federal grand jury returned a 12-count indictment against petitioner. The indictment charged that on 12 separate occasions between January 15 and June 15, 1990, petitioner knowingly and willfully misapplied federally guaranteed student loan funds, in violation of 20 U.S.C. 1097(a) and 18 U.S.C. 2. Pet. App. A4.

On February 7, 1995, petitioner filed a motion to dismiss the indictment. Petitioner argued that the offense of misapplication under Section 1097 required proof of (1) a conversion of guaranteed student loan funds, and (2) fraudulent intent. Petitioner further contended that the indictment was defective for failing to allege facts constituting conversion and fraudulent intent. The district court held that the essential elements of a misapplication offense under Section 1097(a) include "(1) that the funds described in the indictment were provided and insured under [Title IV of the HEA] at the time alleged; (2) that the defendant willfully and knowingly misapplied such funds [by converting them to the defendant's own use or the use of another]; and (3) that he did so with an intent to injure or defraud the United States." Pet. App. A22. Because the indictment did not allege that petitioner committed the alleged acts "with an intent to injure or defraud the United States," the court dismissed the indictment as being "insufficient on its face." *Id.* at A23.

4. The court of appeals reversed. Pet. App. A1-A13. The court observed that the Eleventh Circuit and a district court from within that Circuit have read into the offense of misapplication under Section 1097 an additional element of intent to defraud on the ground that courts have read "an intent to injure or defraud" element into the crime of misapplication of bank funds under 18 U.S.C. 656.[7] Pet. App. A7 (citing

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[7] Section 656 provides that "[w]hoever, being an officer, director, agent or employee of, or connected in any capacity

United States v. *Kammer*, 1 F.3d 1161, 1165 (1993), and *United States* v. *Jakeway*, 783 F. Supp. 590, 597 (M.D. Fla. 1992)). The court of appeals explained, however, that an "[i]ntent to injure or defraud the bank is not subsumed within the phrase 'willful misapplication,' but rather is a separate and distinct component of [Section] 656" that "must be proved *in addition to* willful misapplication." *Id.* at A8. The court also stated that "the language of [Section] 656, like that of [Section] 1097(a), does not explicitly require the defendant to have acted with specific fraudulent or injurious intent." *Ibid.* The court found "a historical rationale" for reading that mental element into Section 656, however, because language requiring an intent to injure or defraud the bank had been "inadvertently dropped in the course of a technical revision of the criminal code." *Id.* at A8-A9 (quoting *United States* v. *Bates*, 852 F.2d 212, 215 (7th Cir. 1988)). In contrast, "Section 1097(a) has never included a requirement that the defendant have acted with an intent to injure or defraud the government." *Id.* at A9. Because there is "no textual or historical basis for doing so," the court declined "to read such a requirement into the statute." *Ibid.* "Rather," the court concluded, "the government must prove that the defendant misapplied—i.e., converted—Title IV funds and that he did so knowingly and willfully." *Id.* at A10.

The court explained that "[c]onversion may include misuse or abuse of property [and] it may reach use in

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with any * * * [listed bank], embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank * * * shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use." Pet. App. A11 (quoting *Morissette* v. *United States*, 342 U.S. 240, 272 (1952)). The court also noted that this Court in *United States* v. *Pomponio*, 429 U.S. 10, 12-13 (1976) (per curiam), which involved a criminal tax prosecution, had defined "willfulness as the 'voluntary, intentional violation of a known legal duty.'" Pet. App. A10. The court concluded that, "as a working definition, willful misapplication under [Section] 1097(a) requires the government to allege and prove that the defendant consciously, voluntarily, and intentionally exercised unauthorized control or dominion over federally provided or guaranteed Title IV funds that interfered with the rights of the funds' true owner(s), for the use and benefit of the defendant or a third person, while knowing that such an exercise of control or dominion over the funds was a violation of the law." *Id.* at A11.

The court of appeals also held, contrary to petitioner's contention, that the indictment alleged sufficient facts to constitute conversion, because the indictment sufficiently charged that petitioner's "handling of federally guaranteed funds was * * * 'unauthorized.'" Pet. App. A12.[8] Because it con-

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[8] The court of appeals observed that the indictment alleged "(1) that [Acme] had a duty to refund unearned student loans to the lender within thirty to sixty days; (2) that due to the participation agreement and the warnings of Acme's financial aid director, [petitioner] knew of this duty; (3) that [petitioner] specifically directed Acme personnel not to make refunds that were required by law; and (4) that [petitioner] instead made management and salary payments to the Jacksons and to Education America, of which [petitioner] happened to be vice president." Pet. App. A12. Those allegations, the court

cluded that the indictment "included all of the requisite elements of willful misapplication" under Section 1097(a), the court of appeals vacated the district court's judgment dismissing the indictment. *Id.* at A13.

SUMMARY OF ARGUMENT

A. The definition of the elements of a criminal offense is entrusted to the legislature, and "in determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986). Section 1097(a) provided, at the time of the offenses charged in this case, that "[a]ny person who knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false statement, or forgery" student loan funds in amounts exceeding $200 is guilty of a felony. 20 U.S.C. 1097(a) (1988). The text of Section 1097(a) does not contain a requirement that a defendant misapply funds "with an intent to injure or defraud the United States." Rather, the statute contains an express *mens rea* requirement—that the defendant act "knowingly and willfully."

The structure of the statute is also inconsistent with implying an "intent to injure or defraud" element into a misapplication offense. The statute makes it a crime to misapply student loan funds *or* to obtain those funds by fraud, thus indicating that misapplication is a separate offense from the fraudulent acquisition of funds. In addition, Section 1097(d) makes it a felony when a person "knowingly and

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held, "clearly make out a charge that [petitioner's] handling of Acme's federally guaranteed student loan funds was unauthorized." *Ibid.*

willfully destroys or conceals any record relating to the provision of [Title IV] assistance * * * with intent to defraud the United States." Congress's inclusion of specific language requiring an intent to defraud in subsection (d) but not in subsection (a) confirms that Congress did not intend a misapplication offense under Section 1097(a) to require an intent to defraud.

An "intent to injure or defraud" element cannot be gleaned from the statute's mental element that the defendant act "knowingly and willfully." Those terms require proof that a defendant be aware of the facts constituting the violation and the defendant act intentionally, such that the misapplication of funds prohibited by Section 1097(a) amounts to a criminal conversion. The phrase "knowingly and willfully" does not require proof of an intent to injure or defraud, or proof that the defendant was aware of the illegality of his conduct.

Section 1097(a)'s history provides no support for construing the misapplication offense to require proof of an intent to injure or defraud. Nor does the 1992 amendment to Section 1097(a), which makes it a separate offense to fail to refund student loan proceeds, indicate that an intent to injure or defraud is an element of the offense.

Finally, Section 1097(a) should not be read to incorporate prior judicial constructions of 18 U.S.C. 656, which proscribes willful misapplication of bank funds. Lower courts have read into Section 656 "an intent to injure or defraud" element based on the fact that direct antecedents of that statute had contained such a requirement until the statute was recodified in 1948. Section 1097(a) has no similar history, however, and there was no settled understanding at the time

Congress enacted Section 1097(a) that the words "willfully misapplies" inherently require an element of an intent to defraud or injure.

B. The indictment in this case, which alleges that petitioner knowingly and willfully misapplied student loan funds by failing to refund those funds when due, sufficiently alleges that petitioner committed misapplication in violation of Section 1097(a). Because an intent to injure or defraud is not an element of the offense, an allegation of such intent is unnecessary.

ARGUMENT

A. "Intent To Injure Or Defraud" Is Not An Element Of The Offense Defined By 20 U.S.C. 1097(a)

1. This Court often has emphasized that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)). Thus, "in determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986).

The primary source for identifying the elements of a criminal offense is the statutory text, and this Court has often declined to add elements that have no basis in that text. Most recently, in *United States* v. *Wells*, 117 S. Ct. 921 (1997), this Court held that materiality is not an element of the crime of knowingly making a false statement to a federally insured bank under 18 U.S.C. 1014. Examining the text of Section 1014, which did not "so much as mention materiality," the Court concluded that, "under the first

criterion in the statutory interpretation hierarchy," materiality is not an element of the offense. 117 S. Ct. at 927. Similarly, in *United States* v. *Shabani*, 513 U.S. 10 (1994), the Court unanimously rejected the argument that courts should read into the drug conspiracy statute, 21 U.S.C. 846, a requirement that a conspirator have committed an overt act in furtherance of the conspiracy. The Court noted that, unlike the general conspiracy statute, 18 U.S.C. 371, the text of Section 846 does not contain an overt act requirement. The Court accordingly held that, "[i]n light of this additional element in the general conspiracy statute, Congress' silence in [Section] 846 speaks volumes." 513 U.S. at 14; see also *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 256-257 (1994) (rejecting argument that 18 U.S.C. 1962(c) requires proof of economic motive, and noting that "[n]owhere in [the statute] is there any indication that, an economic motive is required"); *United States* v. *Culbert*, 435 U.S. 371, 373, 380 (1978) (rejecting claim that, to establish violation of the Hobbs Act, 18 U.S.C. 1951, it must be shown that defendant engaged in "racketeering" activities, and noting that "the absence [in the statute] of any reference to 'racketeering' * * * is strong evidence that Congress did not intend to make 'racketeering' an element of a Hobbs Act violation").

The principle that Congress's definition of the elements of a criminal offense is generally controlling compels the conclusion that the knowing and willful misapplication of federally insured student loan funds in violation of 20 U.S.C. 1097(a) does not require proof that the defendant acted with an intent to injure or defraud. No such words appear in the

definition of the misapplication offense. Nor are such concepts implicit in the word "misapply".[9]

Petitioner concedes (Br. 3, 7), and the courts of appeals agree (Pet. App. A10-A11; *United States* v. *Kammer*, 1 F.3d 1161, 1165 (11th Cir. 1993)), that misapplication under Section 1097(a) is a species of conversion. In construing 18 U.S.C. 641, which punishes one who "embezzles, steals, purloins, or knowingly converts to his own use or the use of another" government property, this Court in *Morissette* v. *United States*, 342 U.S. 246 (1952), observed that conversion may occur "without any intent to keep and without any wrongful taking" and "may reach use [of property] in an unauthorized manner or to an unauthorized extent." *Id.* at 271-272. Although the Court in *Morissette* held that "mere omission from [Section] 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced," *id.* at 263, the Court also concluded that the *mens rea* requirement of the statute is satisfied if the defendant "had knowledge of the

[9] At the time of enactment of the misapplication offense, as now, the standard dictionary definition of the word "misapply" confirms that the word "misapply" does not connote "fraud." See, *e.g.*, *The Random House Dictionary of the English Language* 1228 (2d ed. 1987) ("misapply" means "to make a wrong application or use of"); *Webster's Third New International Dictionary* 1442 (1986); ("misapply" means "to apply wrongly"); VI *The Oxford English Dictionary* 494 (1978) ("misapply" means "[t]o apply to a wrong person or object; to make a wrong application of"); *The Random House Dictionary of the English Language* 914 (1966) ("misapply" means "to make a wrong application or use of"); *Webster's New International Dictionary of the English Language* 1568 (2d ed. 1958) ("misapply" means "[t]o apply wrongly; to use for a wrong purpose").

facts, though not necessarily the law, that made the taking a conversion," *id.* at 271. Similarly, misapplication under Section 1097(a), like the crime of conversion, requires proof of misuse or unauthorized use of federally insured student loan proceeds for the benefit of the defendant or a third party. Unlike the statute in *Morissette*, Section 1097(a) has an express *mens rea* element—that the defendant misapply funds "knowingly and willfully"—and that element requires only that the defendant be aware that his use of the funds is unauthorized or wrongful and that he act intentionally. There is no basis for reading into the statute an additional *mens rea* requirement of an intent to injure or defraud.

Indeed, Congress separately addressed the fraudulent acquisition of student loan funds in Section 1097(a). That provision makes it an offense to "obtain[]" student loan funds "by fraud."[10] The fact

[10] Section 1097(a) is worded similarly to a number of statutes employing the words "willfully" and "misapplies" that punish persons who take or misuse federally provided or insured funds. Some of those statutes, like Section 1097(a), also separately prohibit fraud. See, *e.g.*, 7 U.S.C. 2028(d) ("[w]hoever knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false statement, or forgery" food assistance to Puerto Rico); 18 U.S.C. 665(a) ("[w]hoever * * * embezzles, willfully misapplies, steals, or obtains by fraud" funds appropriated under the Comprehensive Employment and Training Act); 20 U.S.C. 1069d ("[w]hoever * * * willfully misapplies, steals, or obtains by fraud" federal educational grants or assistance); 25 U.S.C. 450d ("[w]hoever * * * embezzles, willfully misapplies, steals, or obtains by fraud" Indian self-determination and educational assistance); 42 U.S.C. 1760(g) ("[w]hoever embezzles, willfully misapplies, steals, or obtains by fraud" school lunch program funds); 42 U.S.C. 1761(*o*)(2) ("[w]hoever * * * knowingly or willfully embezzles, misapplies, steals, or

that Congress separately prohibited the fraudulent appropriation of student loan funds strongly suggests that misapplication under Section 1097(a) prohibits a different form of misconduct.

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obtains by fraud, false statement, or forgery" food service program funds for children in service instiutions); 42 U.S.C. 3795 ("[w]hoever embezzles, willfully misapplies, steals, or obtains by fraud" Department of Justice funds); see also 12 U.S.C. 630 ("[e]very officer * * * who embezzles, abstracts, or willfully misapplies any of the money [of corporations organized to do foreign banking] * * * ; or who makes any false entry * * * with intent * * * to injure or defraud"); 15 U.S.C. 645(b) ("[w]hoever * * * (1) embezzles, abstracts, purloins, or wilfully misapplies any money * * * , or (2) with intent to defraud the [Small Business] Administration * * * makes any false entry * * *, or (3) with intent to defraud participates"); 15 U.S.C. 714m(b) ("[w]hoever * * * (i) embezzles, abstracts, purloins, or wilfully misapplies any money * * *; or (ii) with intent to defraud the [Commodity Credit] Corporation * * * makes any false entry"); 42 U.S.C. 3220(b) ("[w]hoever * * * (1) embezzles, abstracts, purloins, or willfully misapplies [economic development funds] * * *, or (2) with intent to defraud the Secretary [of Health and Human Services] * * * makes any false entry").

There are some other statutes prohibiting misapplication that do not make the crime of fraud a separate offense. See, *e.g.*, 18 U.S.C. 656 ("[w]hoever * * * embezzles, abstracts, purloins or willfully misapplies" bank funds); 18 U.S.C. 657 ("[w]hoever * * * embezzles, abstracts, purloins or willfully misapplies" funds belonging to certain banking institutions); 18 U.S.C. 660 ("[w]hoever * * * embezzles, steals, abstracts, or willfully misapplies" property of a common carrier); 18 U.S.C. 669(a) ("[w]hoever knowingly and willfully embezzles, steals, or * * * converts to the use of any person other than the rightful owner, or intentionally misapplies" any property of a health care benefit program); 18 U.S.C. 1163 ("[w]hoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied" property belonging to Indian tribal organizations).

The overall structure of Section 1097 further shows that Congress did not require proof of an intent to injure or defraud in the misapplication offense. Congress enacted Section 1097(d) at the same time as it enacted Section 1097(a). Education Amendments of 1980, Pub. L. No. 96-374, § 451(a), 94 Stat. 1453; see also 20 U.S.C. 1087-4 (1976) (former criminal penalties under GSL program). Section 1097(d) prohibits the "[o]bstruction of justice" by "[a]ny person who knowingly and willfully destroys or conceals any record relating to the provision of [Title IV] assistance * * * *with intent to defraud the United States*." 20 U.S.C. 1097(d) (emphasis added). The absence of any similar "intent to defraud" language in subsection (a) indicates that Congress did not mean to require any additional element of intent when it prohibited a person from "knowingly and willfully * * * misappl[ying]" student loan funds. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Petitioner argues (Br. 10-11) that Congress included the word "misapplies" in a list of offenses that require proof of scienter, and that the misapplication offense should therefore be construed similarly. The fact that each offense in Section 1097(a) requires an element of criminal intent, however, does not establish that each offense contains the identical requirement. For instance, this Court has stated that "the word 'embezzle' implies a fraudulent intent." *Grin* v. *Shine*, 187 U.S. 181, 190 (1902). This Court has also described the elements of "stealing,"

however, without including fraudulent intent, *Morissette*, 342 U.S. at 271, and has said that there are "intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining," *id.* at 272; see also *id.* at 271 ("Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing."). Thus, the Court in *Morissette* explained that, because "[t]he books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property," Congress drafted Section 641 "to reach all such instances." *Id.* at 271. Similarly, the inclusion of multiple forms of misconduct in the text of Section 1097(a) indicates that Congress intended to prohibit a variety of criminal acts directed at student loans funds, not all of which involve fraud.

2. a. Petitioner argues (Br. 11) that, because Section 1097(a) uses the words "knowingly and willfully," Congress intended to require proof of "the highest degree of mental culpability." The phrase "knowingly and willfully," however, does not connote an intent to injure or defraud. In *Browder* v. *United States*, 312 U.S. 335 (1941), the Court considered the meaning of the words "willfully and knowingly" in an Act of Congress that punishes persons who "willfully and knowingly" use a passport obtained by a false statement. See Act of June 15, 1917, ch. 30, Tit. IX, § 2, 40 Stat. 227 (codified at 18 U.S.C. 1542). The Court rejected petitioner's argument that the phrase "willfully and knowingly" signifies a use "which is in itself evil as the use of a passport to invoke fraudulently the protection of the United States abroad." 312 U.S. at 340 (internal quotation marks omitted). The Court explained that "[n]one of [the statute's] words suggest that fraudulent use is an element of the crime." *Id.* at 341. Thus, the Court concluded that "[r]ead in its context the phrase 'willfully and knowingly[]' * * * can be taken only as meaning 'deliberately and with knowledge and not something which is merely careless or negligent or inadvertent.'" *Ibid.*

Similarly, this Court in *United States* v. *Yermian*, 468 U.S. 63 (1984), held that 18 U.S.C. 1001, which makes it an offense when a person "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false, fictitious or fraudulent statements," does not require proof of actual knowledge of federal agency jurisdiction. 468 U.S. at 68-69.[11] The Court described the mental element of the statute to require proof of "intentional and deliberate lies," *id.* at 74, but declined to read into the words "knowingly and willfully" "any additional element of intent, such as a requirement that false statements be 'knowingly made in a matter within federal agency jurisdiction,' or 'with the intent to deceive the Federal Government,'" *id.* at 69.

Like the statutes at issue in *Browder* and *Yermian*, there is nothing in the text or structure of Section 1097(a) that signifies that Congress intended that an offense of misapplication include an additional element of an intent to injure or defraud. The more

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[11] Section 1001 was amended in 1996 without relevant change. False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459.

natural reading of the statute, particularly in light of the statute's separate prohibition of fraudulent conduct and the explicit inclusion of the phrase "intent to defraud" in subsection (d) of the statute, is that an intent to injure or defraud is not an element of the misapplication offense.

Petitioner and his amicus (Pet. Br. 11-13; Amicus Br. 10-12) argue that reading an intent to injure or defraud element into the statute is necessary to prevent the statute from reaching innocent conduct. See *Liparota*, 471 U.S. at 426; *Staples*, 511 U.S. at 610; *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 70-72 (1994). A defendant who knowingly and intentionally misuses or converts federally guaranteed student loan funds, however, has not engaged in "apparently innocent conduct." *Liparota*, 471 U.S. at 426.[12]

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[12] In support of his position, petitioner mistakenly relies (Br. 12) on *United States* v. *Britton*, 107 U.S. 655 (1883). In *Britton*, this Court held that the offense of willful misapplication of bank funds under Revised Statutes Section 5209 (1875) was not charged by an indictment alleging that a bank president had purchased the bank's stock, in contravention of law, and had held the stock in trust for the bank's use. 107 U.S. at 667. The court stated that the offense of "willful misapplication * * * means something different from the acts of official maladministration * * * and it must be a willful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association." *Id.* at 668. The statute at issue, however, contained language explicitly requiring that the government prove an intent to injure or defraud the bank or to deceive a bank officer. *Id.* at 655-656; see pp. 26-27, *infra*. Moreover, the Court's conclusion that the indictment had "charge[d] maladministration * * * rather than criminal misapplication" was based on the fact that the defendant's purchase of stock, which the defendant held "in trust" for the bank, was not a "conversion" of the bank's funds. 107 U.S. at 667. In the present case, petitioner has been charged not with poor administration, but with intentionally failing to make refund payments that he knew were due and owing.

b. Relying on the definition of "willfulness" set forth in *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam), the court of appeals held that Section 1097(a) requires that the defendant must "know[] that [the unauthorized] exercise or control or dominion over the funds was a violation of the law." Pet. App. A10, A11. We disagree. The court's conclusion departs from "the venerable principle that ignorance of the law generally is no defense to a criminal charge." *Ratzlaf* v. *United States*, 510 U.S. 135, 149 (1994); see also *Cheek* v. *United States*, 498 U.S. 192, 199 (1991).

This Court has explained that the word "willfully" is a "word of many meanings," and "its construction [is] often . . . influenced by its context." *Ratzlaf*, 510 U.S. at 141 (quoting *Spies* v. *United States*, 317 U.S. 492, 497 (1943)). Standard definitions of "willfully" do not include any requirement of knowledge of illegality. See Model Penal Code §§ 2.02(8) and (9) & cmts. 10, 11 (1985); 1 E. Devitt, *et al.*, *Federal Jury Practice and Instructions* § 17.05 (4th ed. 1992). In the context of federal criminal tax offenses, however, the Court in *Pomponio* reaffirmed that the word "willfully" requires proof of a "voluntary, intentional violation of a known legal duty." 429 U.S. at 12; see *Cheek*, 498 U.S. at 200-204; *United States* v. *Bishop*, 412 U.S. 346, 360 (1973); *United States* v. *Murdock*, 290 U.S. 389, 394-395 (1933). "This special treatment of criminal tax offenses is largely due to the complexity of the tax laws." *Cheek*, 498 U.S. at 200.

Similarly, the Court in *Ratzlaf*, *supra*, held that a prosecution under 31 U.S.C. 5322(a) (1988), which imposes penalties for "[a] person willfully violating," *inter alia*, the antistructuring provision of 31 U.S.C. 5324(3) (1988), requires that a defendant know that currency structuring is illegal.[13] 510 U.S. at 149. The Court reasoned that a failure to construe the word "willfully" as requiring a knowing violation of the law would render the word superfluous in light of Section 5324(3)'s requirement that a currency transaction be structured "for the purpose of evading" reporting requirements. *Id.* at 140-141. Moreover, because the statute's "omnibus 'willfulness' requirement, when applied to other provisions in the same subchapter," consistently has been read to require "a 'specific intent to commit the crime,'" *id.* at 141, the Court found a "strong[] cause to construe a single formulation * * * the same way each time it is called into play" *id.* at 143 (emphasis omitted). Finally, the Court expressed the view that currency structuring in order to avoid reporting requirements "is not inevitably nefarious." *Id.* at 144.

Section 1097(a), however, lacks the distinctive contextual features found in the tax and antistructuring statutes that justified a departure from the general rule that ignorance of the law is no defense. See *Cheek*, 498 U.S. at 199. Unlike the tax statutes, there is no danger that a defendant who engages in the knowing and intentional conversion covered by

[13] Following the Court's decision in *Ratzlaf*, Congress amended the relevant provisions to provide that an antistructuring offense does not require proof of knowledge of illegality. See Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, Tit. IV, § 411, 108 Stat. 2253.

Section 1097(a) might inadvertently commit an offense. And unlike the crime of structuring currency transactions, there is no underlying regulatory prohibition that contains its own *mens rea* requirement. Rather, like the statutes at issue in *Browder* and *Yermian*, the *mens rea* requirement of misapplication under Section 1097(a) is satisfied by knowing and intentional conduct—here, involving consciousness that the use of property is unauthorized. See pp. 14-15, *supra*.

3. The history of Section 1097 does not indicate that Congress intended the misapplication offense to require proof of an intent to injure or defraud. Congress first added criminal penalties to Section 440 of the Higher Education Act of 1965 in the Education Amendments of 1976, Pub. L. No. 94-482, § 127(a), 90 Stat. 2141. Those penalties were codified at 20 U.S.C. 1087-4 (1976) and applied only to GSL program funds. See H.R. Conf. Rep. No. 1701, 94th Cong., 2d Sess. 196-197 (1976). A House Report to the 1976 Amendments indicates that criminal penalties were enacted "[a]s a deterrent to those unscrupulous individuals who would willfully and knowingly embezzle, misapply, steal or obtain by fraud, false statement or forgery, student aid funds." H.R. Rep. No. 1086, 94th Cong., 2d Sess. 12 (1976). There is no indication that Congress intended to punish only those individuals who abused the GSL program with an intent to injure or defraud.[14]

[14] The House Report also included a letter written by Assistant Attorney General Michael Uhlmann that endorsed an earlier version of the bill containing similar language to Section 440(a). The letter stated that the bill's "language tracks fraud sections elsewhere in the United States Code (see 42 U.S.C. 2703, 42 U.S.C. 3791 and 18 U.S.C. 655)." H.R. Rep. No. 1086,

Congress enacted Section 1097 as part of the Education Amendments of 1980 to extend the HEA's criminal penalties to all programs funded under Title IV. Pub. L. No. 96-374, § 451(a), 94 Stat. 1453; H.R. Rep. No. 520, 96th Cong., 1st Sess. 46 (1979). The statute's sparse legislative history contains no suggestion that Congress wanted to limit the criminal penalties in the Act only to conduct constituting fraud.

Petitioner argues (Br. 13-15) that one can infer that Congress knew that misapplication under Section 1097(a) required proof of intent to defraud, because the statute was amended in 1992 to punish an individual who "fails to refund" federally insured student loan funds (see Higher Education Amendments of 1992, Pub. L. No. 102-325, Tit. IV, § 495, 106 Stat. 631). Petitioner argues (Br. 15) that, "[h]ad fraudulent intent not been an element of 'misapplication,'" the government could have brought conduct within the reach of the statute by promulgating regulations "severely restricting the use of funds."

Petitioner's argument is based on the mistaken assumption that, at the time of the conduct charged in the indictment, the "regulatory scheme * * * did not

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supra, at 12. Even if that letter were viewed as an indication of legislative intent, the letter does not suggest that the word "misapplies" signifies fraudulent conduct. Cf. *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 580 (1995); *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 31 n.20 (1977). While the letter compared the bill to "fraud sections," one of the statutory references, 18 U.S.C. 655 (1976), punishes theft by bank examiners and mentions neither the word "fraud" nor "misapply," and the other two references, 42 U.S.C. 2703 (1970) and 42 U.S.C. 3791 (1976), punish any person who either "willfully misapplies" or "obtains by fraud" government property.

stringently restrict the use of student loan proceeds by a school." Br. 15. To support that proposition, however, petitioner relies (Br. 14) solely on the fact that the Department of Education, over time, has changed the accounting requirements for loan proceeds when a lender delivers funds to a school in excess of current tuition charges, and the student requests in writing that the school retain the funds for the student's benefit. 34 C.F.R. 682.604(d)(1)(ii); see note 4, *supra*. Effective July 1, 1993, schools were required to maintain those funds in a designated trust account and were prohibited from commingling them with the school's other funds. 34 C.F.R. 682.604(d)(1)(ii)(B) (1993). Effective July 1, 1995, schools may retain such funds if the school identifies the student and the amount of funds in a "subsidiary ledger account designated for that purpose" and the school maintains "cash in its bank for an amount at least equal to the amount of the funds the institution holds for the student." 34 C.F.R. 668.165(b)(4) (1995).

Those rules, however, in no way alter the requirements in effect in 1990 that schools may apply HEA funds "solely for the purpose specified in and in accordance with the provision of [the HEA] program," 20 U.S.C. 1094(a)(1); that schools establish and publish a "refund policy * * * for the return of unearned tuition and fees or other refundable portion of cost," 20 U.S.C. 1092(a)(1)(F); or that schools refund unearned program funds to lenders following a student's withdrawal, 34 C.F.R. 682.607. Accordingly, even before the 1992 amendment of Section 1097(a), the offense of misapplication encompassed a defendant's deliberate failure to refund loan proceeds that the defendant knew no longer belonged to the school. See *United States* v. *Ross*, 77 F.3d 1525, 1541 (7th Cir.

1996) ("failing to make refunds constituted misapplication within the meaning of [Section] 1097(a) even prior to its amendment").[15] Thus, there is nothing in the 1992 amendment or regulations under the HEA that suggests that Congress intended the offense of misapplication to require proof of an intent to injure or defraud, and certainly no evidence strong enough to overcome the absence of such an element from the statutory text.

4. Amicus Curiae National Association of Criminal Defense Lawyers (NACDL) argues (Br. 6-9) that, by the time Section 1097(a) was enacted in 1980, the offense of "willful misapplication" had a settled meaning that required proof of fraudulent or injurious intent, because courts had required proof of an intent to injure or defraud to establish the criminal misapplication of bank funds under 18 U.S.C. 656 even in the absence of statutory language requiring such proof. That argument lacks merit.

Congress initially created the offense of willful misapplication of bank funds in the Act of June 3, 1864, ch. 106, § 55, 13 Stat. 116. It later appeared as Revised Statutes Section 5209 (1875), see *United States* v. *Britton*, 107 U.S. 655 (1883), and subsequently was codified at 12 U.S.C. 592 (1925). Section 592, like its predecessor versions, included the language "with intent * * * to injure or defraud [the bank] * * *, or

[15] The notion that a defendant's pre-1992 failure to refund student loan proceeds constitutes misapplication is consistent with the 1992 amendment's history. See H.R. Rep. No. 630, 102d Cong., 2d Sess. 513 (1992) ("failure to pay refunds does constitute criminal misapplication under current law. Language is added in this bill merely as clarification."); see also J.A. 40-41 (2/28/92 letter from Sen. Kassebaum to James B. Thomas, Jr., Inspector General, Dep't of Educ.).

to deceive any officer of such [bank]" as an element of the offense. That language was deleted from what is now 18 U.S.C. 656 during the 1948 revision of Title 18 of the Code. The Reviser's note stated that "[t]he revised section without changing in any way the meaning or substance of existing law, clarifies, condenses, and combines related provisions largely rewritten in matters of style." 18 U.S.C. 656 (Supp. III 1948). Based on the peculiar history of Section 656, the lower courts had concluded, before Congress enacted criminal penalties in the HEA, that the offense of willful misapplication of bank funds requires proof of intent to injure or defruad the bank.[16]

Those decisions, however, do not establish that the words "willfully misapplies" have a connotation of requiring intent to injure or defraud that was "generally accepted in the legal community at the time of [the] enactment" of Section 1097(a). *OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 275 (1994). Before Congress made it an offense to misapply student loan funds, courts had not uniformly indicated that the words "willfully misapplies" under Section 656 carry

[16] See, *e.g.*, *Golden* v. *United States*, 318 F.2d 357, 361 (1st Cir. 1963); *United States* v. *Docherty*, 468 F.2d 989, 994-995 (2d Cir. 1972); *United States* v. *Cades*, 495 F.2d 1166, 1168 n.3 (3d Cir. 1974); *United States* v. *Arthur*, 544 F.2d 730, 736 n.11 (4th Cir. 1976); *Garrett* v. *United States*, 396 F.2d 489, 491 (5th Cir.), cert. denied, 393 U.S. 952 (1968); *United States* v. *Logsdon*, 132 F. Supp. 3, 4-5 (W.D. Ky. 1955), aff'd, 253 F.2d 12 (6th Cir. 1958); *United States* v. *Mullins*, 355 F.2d 883, 886 (7th Cir.), cert. denied, 384 U.S. 942 (1966); *Seals* v. *United States*, 221 F.2d 243, 245 (8th Cir. 1955); *Ramirez* v. *United States*, 318 F.2d 155, 157-158 (9th Cir. 1963); *United States* v. *Acree*, 466 F.2d 1114, 1116 (10th Cir. 1972), cert. denied, 410 U.S. 913 (1973).

an implicit element of intent to injure or defraud. Some decisions expressed the view that the omission of the words "intent to injure or defraud" in 1948 was an intentional attempt by the codifier to omit redundant terms. See, *e.g.*, *United States* v. *Logsdon*, 132 F. Supp. 3, 5 (W.D. Ky. 1955), aff'd, 253 F.2d 12 (6th Cir. 1958); *Ramirez* v. *United States*, 318 F.2d 155, 158 (9th Cir. 1963) (agreeing with *Logsdon*). Other decisions, however, expressed the view that the omission was a drafting error necessitating judicial correction. See, *e.g.*, *United States* v. *Pollack*, 503 F.2d 87, 90-91 (9th Cir. 1974) ("those courts which have considered the elimination of the 'intent to injure or defraud' language in [Section] 656, have interpreted such elimination as an oversight" (footnote omitted)); *Docherty*, 468 F.2d at 994 ("courts must be mindful of [Section 656's] history and avoid undue extension as a result of the ill-conceived work of the 1948 reviser").[17] That latter view—one that

[17] Other courts expressed uncertainty as to why the language was deleted. See *United States* v. *Beattie*, 594 F.2d 1327, 1329 (9th Cir. 1979) ("the words 'intent to injure and defraud' in the predecessor statute were omitted (perhaps inadvertently, as the revisers' proposed intention was not to change the meaning of existing law)"); *United States* v. *Michael*, 456 F. Supp. 335, 339 (D.N.J. 1978) (" 'intent to injure or defraud' * * * remains an essential element of the crime * * * notwithstanding the unexplained deletion of those words in the 1948 recodification").

Of course, it is possible that the Reviser may have erred in noting that no substantive change was intended in the 1948 recodification. See *Wells*, 117 S. Ct. at 930 ("Those who write revisers' notes have proven fallible before."); *United States* v. *Lanier*, 117 S. Ct. 1219, 1226 n.6 (1997) ("The legislative intent of Congress is to be derived from the language and structure of the statute itself, if possible, not from the assertions of codifiers

reads the element of an "intent to injure or defraud" back into the statute—necessarily implies that the words "willfully misapply" are insufficient by themselves to require proof of an intent to injure or defraud. Thus, courts have been divided on whether those words inherently incorporated an intent to injure or defraud. Compare *Logsdon*, 253 F.2d at 14 (agreeing with the trial court's conclusion that "the words 'did wilfully misapply' constituted a sufficient charge of a criminal intent to defraud"); *United States* v. *Mann*, 517 F.2d 259, 267 n.3 (5th Cir. 1975) (citing *Ramirez* and noting that "the allegation of willful misapplication sufficiently imports an intent to injure or defraud"); *United States* v. *Matot*, 146 F.2d 197, 198 (2d Cir. 1944) (Hand, J.) (stating that " 'wilful misapplication' [under 12 U.S.C. 592] of money presupposes a fraudulent intent"), with *United States* v. *Cooper*, 577 F.2d 1079, 1082 (6th Cir.) ("in common understanding [the term 'misapplies'] has a somewhat different connotation from that of fraud generally"), cert. denied, 439 U.S. 868 (1978); *United States* v. *Vannatta*, 189 F. Supp. 937, 938-939 (D. Haw. 1960) (disagreeing with *Logsdon* and concluding that allegation of willful misapplication does not encompass an allegation of fraudulent intent).

In sum, judicial decisions pre-dating the enactment of criminal penalties in the HEA had adopted disparate views on whether the words "willfully misapplies" in Section 656 intrinsically incorporated an intent to injure or defraud. Because "[i]t would thus

directly at odds with clear statutory language."). Thus, Congress may have deleted the "intent to injure or defraud" language simply because Congress no longer intended it to be an element of the offense.

be impossible to say which view Congress might have endorsed," *Wells*, 117 S. Ct. at 930, decisions interpreting Section 656 do not support petitioner's construction. See, *e.g.*, *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 527-532 (1994) (rejecting reliance on pre-enactment decisions because although majority of courts had awarded attorneys' fees under predecessor statute, not all courts had expressed a uniform construction of relevant language in statute).[18]

The contention that the offense of willful misapplication under Section 656 had a settled meaning that included an intent to defraud or injure is also undermined by the common understanding of that offense today. As the decision below explained (Pet. App. A8), "willfully misapplies" and "intent to injure or defraud" are treated as separate elements of a Section 656 offense, and each has a distinct meaning. See generally 2 E. Devitt, *et al.*, *Federal Jury Practice and Instructions* § 30.03 (4th ed. 1990) (listing the requirement that defendant "willfully misapplied" bank funds as separate element from requirement

[18] Nor is there any reason to think, as amicus NACDL suggests (Br. 8-9), that Congress had in mind or was even aware of state court decisions construing the words "willful misapplication" in fidelity guarantee contracts. In the context of such contracts, which insure against losses caused by a lack of fidelity or honesty of employees or other persons holding positions of trust, it is hardly surprising that, for the loss to be insured, "it is generally held that the employee's misappropriation or misapplication must be done with a dishonest or fraudulent intent, although it is not necessary that it constitute a crime." See 9A J. Appleman & J. Appleman, *Insurance Law and Practice* § 5670 (1981) (footnote omitted). In contrast, Section 1097(a) applies to anyone who intentionally takes or misuses federal student loan funds, whether or not the defendant holds those funds pursuant to a trust relationship.

that the defendant "did so with the intent to injure or defraud the bank"), § 30.05 (defining "willfully misapplies" as "the unauthorized or unjustifiable or wrongful use of the monies, funds or credits of the bank" and collecting authorities), and § 30.06 (defining "intent to injure or defraud the bank" as "to act knowingly and with the intent to deceive or to cheat the bank" and collecting authorities). In any event, Section 1097(a) and Section 656 are worded differently and there is no indication that Congress patterned the former after the latter. Unlike Section 656, Section 1097(a) makes it a separate offense to "obtain[] [funds] by fraud." The wording of Section 1097(a) thus casts serious doubt on the proposition that Congress intended that the offense of misapplication require proof of intent to injure or defraud.

5. Finally, petitioner contends (Br. 16-17) that, to the extent that Section 1097(a) is ambiguous, the rule of lenity supports an interpretation of the statute to require a showing of an intent to injure or defraud. "Read straightforwardly," however, Section 1097(a) "reveals no ambiguity, its *mens rea* requirements narrow the sweep of the statute, and this is not a case of guesswork reaching out for lenity." *Wells*, 117 S. Ct. at 931. Accordingly, the rule of lenity does not compel reading an intent to injure or defraud into the offense of misapplication under Section 1097(a).

B. The Indictment Sufficiently Alleges The Offense Of Misapplication Under Section 1097(a)

1. Petitioner contends (Br. 19) that the indictment is insufficient for failing to allege that petitioner intended to defraud anyone by the alleged acts. Because intent to defraud is not an element of the misapplication offense under Section 1097(a), how-

ever, an allegation of fraudulent intent is unnecessary. *Hamling* v. *United States*, 418 U.S. 87, 117-118 (1974).

2. Petitioner also argues (Br. 19) that the indictment does not allege facts constituting a conversion of student loan proceeds, because the indictment does not set forth how Acme applied those proceeds. That issue, however, was not raised in the petition for a writ of certiorari and thus is not properly before the Court. See Sup. Ct. R. 24.1(a).

In any event, petitioner's contention is based on a misunderstanding of the HEA and this Court's teaching in *Morissette* that conversion "may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful." 342 U.S. at 271-272. Under the HEA, schools receive loan proceeds directly from lenders. 20 U.S.C. 1078(b)(1)(N); 34 C.F.R. 682.604(c). The school must either disburse the amount of those funds to the student or apply the funds "to credit a registered student's account." 34 C.F.R. 682.604(d). Upon a student's withdrawal from a school, the school is required to refund the "unearned" tuition and other "refundable" charges. 20 U.S.C. 1092(a)(1)(F); 34 C.F.R. 682.605-682.607. Accordingly, even if a school properly credits a student's account by the amount of the student loan proceeds, the funds may be converted, *i.e.*, misapplied, by a failure to make required refunds.[19]

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[19] In *Kammer*, the Eleventh Circuit held that a school's failure to refund federal educational grant funds is not a conversion under Section 1097(a) because HEA regulations allow a school "to commingle its own monies with federal financial aid funds." 1 F.3d at 1166. The court reasoned that a "financially endangered" school which fails to refund money that it "[does] not have" lacks the "criminal intent to defraud." *Ibid.* The court's decision, however, is based on the incorrect premise that the statute requires proof of an intent to defraud and the misperception that the HEA imposes no government "supervision and control over the funds after the point of the commingling of the funds." *Ibid.* See 34 C.F.R. 668.23 (audit requirements), 682.605-682.607 (refund requirements).

The indictment in this case alleges facts sufficient to establish that petitioner converted federal loan funds by deliberately failing to refund those funds when due. See Pet. App. A12. Specifically, according to the indictment, petitioner intentionally directed Acme employees not to make refund payments and gave priority to payments for management fees and salary to the Jacksons and Education America over discharging Acme's refund obligations. J.A. 4-5 (¶¶ 4, 11). Petitioner committed those acts despite Acme's mounting refund liability debt, the warnings of Acme's Financial Aid Director, and petitioner's awareness of a school's duty to comply with the requirements under the HEA and the Department of Education's regulations. J.A. 3-5 (¶¶ 4-5, 8, 10, 12). Those allegations clearly set forth facts establishing the "use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use." *Morissette*, 342 U.S. at 272.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Section 1097 of Title 20 (1988) provides:

§ 1097. Criminal penalties

(a) In general

Any person who knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false statement, or forgery any funds, assets, or property provided or insured under [Title IV] shall be fined not more than $10,000 or imprisoned for not more than 5 years, or both; but if the amount so embezzled, misapplied, stolen, or obtained by fraud, false statement, or forgery does not exceed $200, the fine shall not be more than $1,000 and imprisonment shall not exceed one year, or both.

(b) Assignment of loans

Any person who knowingly and willfully makes any false statement, furnishes any false information, or conceals any material information in connection with the assignment of a loan which is made or insured under [Title IV] shall, upon conviction thereof, be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Inducements to lend or assign

Any person who knowingly and willfully makes an unlawful payment to an eligible lender under part B of this subchapter as an inducement to make, or to acquire by assignment, a loan insured under that part shall, upon conviction thereof, be fined not more than $1,000 or imprisoned not more than one year, or both.

(d) Obstruction of justice

Any person who knowingly and willfully destroys or conceals any record relating to the provision of assistance under [Title IV] with intent to defraud the United States or to prevent the United States from enforcing any right obtained by subrogation under this part, shall upon conviction thereof, be fined not more than $10,000 or imprisoned not more than 5 years, or both.